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Supreme Court of the United States

OCTOBER TERM 1945

No. 1078

ABRAHAM JESKOWITZ,
Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

ARCHIBALD PALMER,
Counsel for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Abraham Jeskowitz prays that a return of certiorari issue to review the order and decree of the Circuit Court of Appeals for the Second Circuit entered on the 14th day of February, 1946 (R. 51, 52*), affirming an order of the District Court of the United States for the Southern District of New York, dated the 10th day of September, 1945 (R. 41 to 44).

Opinions Below

The order was affirmed by the Circuit Court of Appeals without opinion (R. 49, 50).

The District Judge rendered an opinion granting the motion to punish for contempt (R. 41).

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* Numbers in parentheses refer to page numbers in the record.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on the 14th day of February, 1946 (R. 51, 52).

The jurisdiction of the Court is under Section 24 (c) of the Bankruptcy Act and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts

Abraham Jeskowitz, the petitioner herein, was the president of the Union Fabrics, Inc. On December 20, 1939, an involuntary petition in bankruptcy was filed against said Union Fabrics, Inc., and thereafter, and on January 6, 1940, an order of adjudication was entered referring the proceedings to the Honorable Peter B. Olney, Referee in Bankruptcy. At a first meeting of creditors Leonard H. Cohen was duly appointed Trustee in Bankruptcy and qualified by filing the bond as required of him. Subsequently examinations under Section 21-A of the Bankruptcy Act were conducted (R. 31).

The turnover proceedings were commenced by the petition of the Trustee, verified the 25th day of October, 1940, charging the petitioner, as president and sole stockholder of said bankrupt, with having failed to account for certain merchandise or the proceeds of the sale thereof, a diamond ring received as collateral by the bankrupt, or the proceeds of the sale thereof, and certain of the bankrupt's books and records, as follows: general ledger for 1937, journal for 1938, records and inventories of the bankrupt's merchandise taken as of January 25, 1937; May 31, 1937; January 1, 1938; May 31, 1938; October 31, 1938; December 31, 1938; January 31, 1939, and June 30, 1939, and all purchase invoices for the year 1937. Petitioner appeared and interposed an answer denying the material allegations of the petition (R. 32).

Hearings were commenced on January 27, 1941, and continued until October 25, 1941, by which time there had been adduced 315 pages of testimony. Petitioner, who had no legal training, had no alternative, because of lack of funds, but to conduct his own defense to the proceedings up to September 24, 1941, when he was able to retain Chester A. Lessler, Esq., to conclude the hearing on the original petition (R. 32).

On October 25, 1941, the Referee granted a petition of the Trustee for leave to amend the original turnover petition predicated upon the dollar value of an opening inventory alleged to have existed as of January 31, 1938, the amount of its purchases from that date to September 28, 1939 (the date of the general assignment for the benefit of creditors by the Union Fabrics, Inc.), the cost of the merchandise sold during that period at 10 percent gross profit or at cost, and the value of the inventory on hand on September 28, 1939. The amended petition did not seek the turnover of the purchase invoices for the year 1937 (R. 32).

Additional testimony was taken based upon the amended petition and answer thereto, which denied the material allegations of said petition and thereafter, and on the 23rd day of February, 1943, a period of three and a half years after the general assignment for the benefit of creditors was made, the Referee handed down a memorandum decision in which he accepted the figure of $197,785.05 as representing the cost of the merchandise on hand on January 1, 1939, and the figure of $322,587.36 as representing the cost of the merchandise sold between January 1, 1939, and September 28, 1939. The latter figure was based upon a presumption under Section 21-L of the Bankruptcy Act that the merchandise was sold at a price not less than cost. This presumption was indulged in by reason of the Trustee's contention that the bankrupt did not turn over to the Trustee the books and records which were necessary to determine the cost of the merchandise sold by the Union

Fabrics, Inc., during the said period from January 1, 1939, to September 28, 1939. Then, by a series of presumptions, the Referee concluded that petitioner had in his possession and under his control merchandise of the cost value of $69,921.24 (R. 32, 33).

The various presumptions which resulted in the making of the turnover order are as follows:

The first presumption was that allowed by Section 21-L which resulted in the Referee finding that the merchandise sold during the period as charged was sold at a price not less than cost. The accountant for the Trustee testified that the bankrupt had failed to turn over the books and records from which the cost price of the merchandise sold could be ascertained. Petitioner, during the course of the hearings, did not have an accountant and was not advised that the Trustee did have books and records from which the cost price of the merchandise could be ascertained. Consequently the Referee accepted the testimony offered by the Trustee and, based upon the legal presumption, found that the merchandise sold was at a price not less than cost. As a result of the figure adopted as the price of the merchandise sold, the Referee came to the conclusion that the bankrupt failed to account for merchandise of the cost value of $69,921.24.

The second presumption adopted by the Referee was to the effect that if the bankrupt did fail to account for said merchandise, then said merchandise must have been in the possession of petitioner, who was the sole stockholder and officer of the corporation as of the date of the execution of the general assignment for the benefit of creditors, to wit, September 28, 1939. There was never any factual proof that petitioner did come into possession or have in his possession or under his control merchandise of the cost value of $69,921.24 on September 28, 1939, or at any other date.

The third presumption adopted by the Referee was that petitioner continued to have possession and control of the

property or the proceeds thereof, namely, $69,921.24, on February 23, 1943, when the order was made, since on the basis of the prior presumptions he should have had that property in his possession or under his control on September 28, 1939, more than three and a half years previous to the making of the order.

The Trustee neither by the original petition nor the amended petition set forth that he was relying upon a presumption of law under Section 21-L of the Bankruptcy Act to establish that the merchandise sold between January 1, 1939, and September 28, 1939, was at a price not less than cost. Petitioner was therefore not advised that the Trustee sought to rely on the presumption under Section 21-L and did not endeavor to meet such an issue. Had the Trustee indicated in either the original or amended petition that he would seek to establish his contentions by relying upon the presumption that the merchandise was sold at a price not less than cost, the appellant would have sought to introduce evidence to show that the Trustee had books and records in his possession from which he could ascertain the actual cost of the merchandise sold by the bankrupt (R. 33).

Although the Trustee failed to offer any actual proof to support the petition for the turnover, the respondent offered proof to show that there was no basis for the mathematical computation prepared by the Trustee and submitted as proof in support of the turnover and that he did not have any property of any kind, nature or description and was unable even to support his family and pay the rent for his apartment (R. 34).

Testimony was introduced on behalf of petitioner that the Union Fabrics, Inc., was a corporation formed in 1937 and was in the business of converting rayon and silk fabrics, with offices in the City of New York. Said corporation had previously taken over the assets and liabilities of a corporation known as Union Silk Mills, Inc., which was jointly controlled by petitioner and Louis Berk-

man. The formation of the new corporation was due to the withdrawal of Louis Berkman and the sale of his stock to petitioner, who took over the entire assets of the Union Silk Mills, Inc., at a price arrived at through an agreement between the parties. Petitioner continued the business as sole owner and manager with the same inventory, assets, liabilities and records, and continued in business until September, 1939. In September, 1939, the Union Fabrics, Inc., was forced to make an assignment for the benefit of the creditors because of the financial condition of the business. Petitioner and his witnesses offered testimony to the effect that no piece goods of any kind were ever withdrawn from the corporation except in the regular course of business and that entries in connection with all sales had been made in the books and records of the Union Fabrics, Inc., and that petitioner had made no withdrawals from the Union Fabrics, Inc., except in the regular course of business and only withdrew such moneys as he was entitled to and for which a record was duly made. The Union Fabrics, Inc., used, in the main, the same type of bookkeeping as was used by its predecessor corporation and carried forward the identical perpetual inventory used by the Union Silk Mills, Inc., for a period of five years prior to the incorporation of the bankrupt firm. This inventory book was continued where the old corporation left off, with its many errors and omissions. These perpetual inventory books were used as a basis for arriving at one of the Trustee's theories in his petition for the turnover. The Referee, however, accepted the figure of $194,785.05 as representing the cost of the merchandise on hand on January 1, 1939, even though evidence was offered to show that there were many errors and omissions totaling approximately 113,000 yards of merchandise in the inventory record. The Referee applied Section 21-L of the Bankruptcy Act and considered the merchandise sold during the period January 1, 1939, to September 28, 1939, at not less than cost even though the Trustee had on hand the

sales book, the perpetual inventory book and the dye book, as well as the purchase invoices for the years 1938 and 1939 (R. 34, 35).

Testimony was also introduced on behalf of petitioner that he never removed any property of any kind from the Union Fabrics, Inc.; that he had not withdrawn any moneys from the Union Fabrics, Inc., except in the regular course of business and except as was entered in the books and records of account; and that he did not have, either on September 28, 1939, or at any time during the turnover proceedings, any portion of the said sum of $69,924.21 (R. 35).

A petition to review the order of the Referee was filed by petitioner, and upon such review before the District Court the Referee's order was affirmed on May 6, 1943, mainly upon the theory that it could not be said that the Referee's finding was so clearly erroneous as to warrant the District Court to reach a different determination (R. 35).

An appeal was taken to the Circuit Court of Appeals and on August 8, 1944, the Circuit Court of Appeals affirmed the order of the District Court. The Circuit Court accepted the findings of the Referee since "• • • The inventory sheets and the records that would disclose the cost were missing. Section 21, subdivision (L) of the Bankruptcy Act, 11 U. S. C. A., Section 44, subdivision (L), required the Referee to presume 'until the contrary shall appear that such property was sold at a price not less than cost • • •'". Circuit Judge Frank, in a concurring opinion, stated as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2nd 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obvi-

ously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings" (R. 35-36).

Petitioner thereupon filed a petition for a writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit entered on August 8, 1944. This petition for writ was denied by the Supreme Court on December 11, 1944.

After the Circuit Court of Appeals rendered its decision petitioner sought the advice of Morris H. Gotthilf & Company, certified public accountants, and Archibald Palmer, attorney, with respect to this matter. Said accountant made a study and analysis of the books and records and found that it was possible for the Trustee to ascertain the cost of merchandise sold from the books and records which had been in possession of the Trustee in Bankruptcy. Based upon such findings petitioner made an application to the Referee to reopen the turnover proceeding for the purpose of enabling him to submit testimony that the Trustee was not entitled to rely upon the presumption afforded by Section 21-L of the Bankruptcy Act and that the said Trustee was required to prove the actual cost of the merchandise sold. The Referee denied this motion upon the ground that he could not entertain the same unless petitioner had first obtained permission from the Circuit Court to apply for such relief to the Referee (R. 38).

Petitioner thereupon made an application to the United States Circuit Court of Appeals for an order authorizing him to apply before the Referee to reopen the turnover proceedings and to take additional testimony thereon. This motion was denied by the Circuit Court of Appeals on the 9th day of February, 1945. An application was made for a writ of certiorari from the order denying said motion. The said writ was denied (R. 38).

On September 28, 1944, an order was signed by the Honorable Alfred C. Coxe, District Judge, directing that petitioner show cause why he should not be punished for con-

tempt for failure to comply with the turnover order. Said order to show cause was based upon the petition of Leonard H. Carter, Trustee in Bankruptcy, verified September 26, 1944, a certificate of contempt of the Honorable Peter B. Olney, Referee in Bankruptcy, and various exhibits annexed thereto. Said order to show cause was returnable on October 4, 1944, and was adjourned from time to time. A supplemental petition of Leonard H. Carter, verified May 29, 1945, was filed in connection with said order to show cause. The motion for contempt was predicated on still another presumption to the effect that if petitioner had possession or control of the merchandise, or its proceeds, when the original order passed, then he still continues to have possession and the failure to turn over to the Trustee was a wilful disobedience of said order (R. 3-9).

Petitioner filed an affidavit in opposition to said petition and order to show cause, verified June 29, 1945, in which, in addition to the facts as already set forth herein, he again stated that at the time of the assignment for the benefit of creditors by the Union Fabrics, Inc., he did not have any moneys of any kind, nature or description. As a matter of fact, he was absolutely penniless and did not have sufficient moneys to give his wife and children the bare necessities of life and while the turnover proceedings were pending, and being conducted by him without the aid of an accountant or attorney until September 25, 1942, he had incurred a liability for rent, which he could not pay, to the extent of $1,800. Petitioner was unemployed for about a year and a half after the assignment for the benefit of creditors was made, during which time he borrowed moneys from friends and relatives for the purpose of buying food and clothing for his family. After that he obtained employment from S. T. Paley & Company, of No. 1412 Broadway, New York, as a salesman, and continued in that employ for a period of one year, when that employment ended. It was as a result of this employment that petitioner was able, in the latter part of 1942, to re-

tain Chester A. Lessler to represent him in the turnover proceedings. In 1942 petitioner obtained employment with the firm of Fortune Fabrics, Inc., at a salary of $50 a week, and continued in that employ until approximately December, 1943, and beginning with 1944 he acted as a free lance broker and in such way was able to earn a livelihood. Petitioner in said affidavit stated that he never had the ability to comply with the turnover order made by the Referee on February 23, 1943, and still did not have the ability to comply with said turnover order at that time and requested that a hearing be held and testimony be adduced on the question of whether petitioner has possession or control of the property and whether the refusal to comply with the turnover order is wilful and deliberate (R. 39, 40).

District Judge Conger, without taking any testimony but upon the moving papers and opposing affidavit granted the motion upon the authority of *Oriel* v. *Russell,* 278 U. S. 358, and *Prela* v. *Hubschman.*

Petitioner appealed to the Circuit Court of Appeals and the Circuit Court, on February 14, 1946, affirmed the order of the District Court (R. 51, 52).

Questions Presented

1. Whether a Trustee in Bankruptcy, who, in a turnover proceeding, relies upon a presumption that the property was sold at a price not less than cost, under the provisions of Section 21-L of the Bankruptcy Act, and a presumption of possession based upon a mathematical computation and and continued possession between the time of the filing of the petition and the date of the turnover order, may, in connection with a motion to punish for contempt for failure to comply with such order, rely upon a further presumption that the order once made carries with it the presumption that the respondent continues to have possession and control of the property in question.

2. Whether the Trustee, in connection with a motion to punish for contempt for failure to comply with a turnover order may rely upon a presumption that the respondent still has possession and control of the property in question, should depend upon the length of time that elapsed between the date of the filing of the petition and the date of said turnover order where such turnover order is predicated upon a mathematical computation, as in the case at bar.

3. Whether the failure to take testimony on the question of possession or control of the property and on the question of whether the refusal to comply with the turnover order is wilful and deliberate where petitioner, in his affidavit in opposition to the motion to punish for contempt, requested that a hearing be held and testimony be adduced on such issues, violated the constitutional rights of petitioner.

Statutes Involved

1. Section 21-L of the Bankruptcy Act:

> "In any proceeding under this Act against a bankrupt for an accounting by him for his property or the disposition thereof, or to compel a turnover of property to him, if his books, records, and accounts shall fail to disclose the cost to him of such property sold by him during any period under consideration, it shall be presumed, until the contrary shall appear, that such property was sold at a price not less than the cost thereof to him."

2. Amendment V to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Specifications of Error to be Urged

1. The Courts below erred in holding that a turnover order once made carries a presumption that the respondent continues to have possession and control of the property, even though the said order was predicated upon three separate presumptions, to wit: (a) presumption under Section 21-L of the Bankruptcy Act to the effect that merchandise sold during a certain period was sold at a price not less than cost; (b) presumption that if the bankrupt failed to account for certain merchandise which, according to a mathematical computation, should have been on hand on the date of the filing of the petition, such merchandise must have been in the possession of the petitioner, who was the sole stockholder of the bankrupt corporation; and (c) presumption that if petitioner had possession of the property on September 28, 1939, he continued to have the property on February, 1943, when the order was made.

2. The Courts below erred in failing to hold that where the turnover order is based upon a mathematical computation and there is no actual proof of possession at the time of the filing of the petition but possession is presumed, such presumption grows weaker as time passes and where there is a long delay between the time of the filing of the petition and the date of the turnover order, the Trustee, in connection with a motion to punish for contempt, should not be permitted to rely upon a presumption that the turnover order carries with it the presumption that petitioner still continues to have possession and control of the property.

3. The Court erred in granting the motion to punish for contempt without permitting petitioner to introduce evidence to show an inability to comply with the turnover order and to show that the failure to comply is not wilful or deliberate.

Reasons for Granting Writ

POINT A

A trustee in bankruptcy who, in a turnover proceeding, relies upon a presumption that the property was sold at a price not less than cost, under the provisions of Section 21-L of the Bankruptcy Act, and a presumption of continued possession between the time of the filing of the petition and the date of the turnover, may not, in connection with a motion to punish for contempt for failure to comply with such order, rely upon a further presumption that the order once made carries with it the presumption that petitioner continues to have possession and control of the property in question.

The Court below based its decision upon the law as laid down in the cases of *Oriel* v. *Russell; Samuel Prela* v. *Louis Hubschman,* 278 U. S. 358, 13 A. B. R. (N. S.) 121. The principle of law as laid down in those cases cannot be followed in the case at bar. By reason of the creation of Section 21-L of the Bankruptcy Act by Congress in 1938 and other factors which have not been considered previously by the United States Supreme Court, the case at bar requires a consideration of the issues unaffected by the principle of law enunciated in *Oriel* v. *Russell; Prela* v. *Hubschman,* cited supra.

Oriel v. *Russell* and *Samuel Prela* v. *Louis Hubschman* (cited supra) were decided on January 14, 1929, prior to the enactment of Section 21-L of the Bankruptcy Act, which

created another presumption in favor of a Trustee in Bankruptcy.

The Supreme Court, in the cases of *Oriel* v. *Russell* and *Prela* v. *Hubschman,* cited supra, not only discussed the question of the weight which should be given to a turnover order but also the degree of proof which was necessary to support the original turnover order. As to the degree of proof necessary to establish the turnover order the Supreme Court in *Re Oriel* v. *Russell,* 13 A. B. R. (N. S.) 121, at page 123, stated as follows:

> "We think a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence. The charge upon which the order is asked is that the bankrupt, having possession of property which he knew should have been delivered by him to the trustees, refused to comply with his obligation in this regard. It is a charge equivalent to one of fraud, and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough. The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed."

As to the question of the weight which should be given to the turnover order on a motion to punish for contempt for failure to comply therewith, the Supreme Court at page 126 stated as follows:

> "We find ourselves in general accord on this subject with the remarks of the late Circuit Judge McPherson of the Third Circuit, who used the following language in the case of *In re Epstein* (D. C., Pa.), 30 Am. B. R. 387, 206 F. 568:
>
> > 'In the case in hand, the consequence is that, as the order to pay or deliver stands without sufficient reply, it remains what it has been from the first—*an order presumed to be right,* and therefore an order that ought to be enforced.' " (Italics writer's.)

The entire reasoning of the Supreme Court is that the moving party in a motion to punish for contempt is entitled to rely upon the presumption that the turnover order which is based upon *clear and convincing* proof is presumed to be correct and that the burden is upon the respondent to establish his inability to comply with the turnover order. It is important at this point to understand that the presumption which the Supreme Court had been discussing was the presumption that the turnover order once made continues to be correct.

In other words, if a turnover order is made and the respondent refuses to comply with such turnover order it is presumed that the respondent has possession of the property referred to in the turnover and he wilfully and deliberately refuses to comply therewith. This analysis may be better illustrated by the language in the majority opinion of *In re Prela,* cited supra, where the Circuit Court at page 414 stated as follows:

> "A disobedience of the order to turn over presents a prima facie case of contumacy for punishment. *The burden rests upon the moving party to establish, not beyond a reasonable doubt, but by a fair preponderance of proof, such contumacy. Having been directed to turn over property, it is presumed that the offender continues in his wilful and deliberate conduct when he fails to obey the order.* Applying the rule stated in that opinion, it follows that this order must be affirmed." (Italics writer's.)

In the case at bar the Referee, upon a mathematical computation which resulted from testimony of the accountant for the Trustee, held that as of the 28th day of September, 1939, the Union Fabrics, Inc., bankrupt, should have had on hand merchandise of the value of $69,921.24 and based upon that finding presumed that petitioner, who was the sole stockholder and an officer of the corporation, continued to be in possession or control of that property or its proceeds on the date of the making of the turnover or-

der on February 23, 1943, approximately three and a half years later. This question of presumption has never been considered or decided by the United States Supreme Court.

Seligson v. *Goldsmith,* 128 Fed. (2d) 977;
Robbins v. *Gottbetter,* 134 Fed. (2d) 843.

In connection with the appeal from the order directing the turnover Circuit Judge Frank, who wrote the concurring opinion, in *Cohen* v. *Jeskowitz,* 144 Fed. (2d) 39, stated, at pages 40 and 41, as follows:

> "I concur but with the hope, expressed by Judge Learned Hand in Robbins v. Gottbetter, 2 Cir., 134 F. 2d 843, 844, and Seligson v. Goldsmith, 2 Cir., 128 F. 2d 977, 978, 979, that the Supreme Court will soon grant certiorari in some such case as this and overrule precedents that fasten upon us what seems to him and me an irrational rule of presumption, obviously contrary to fact, which enables trustees in bankruptcy to employ civil actions as substitutes for criminal proceedings."

The turnover order itself is based upon a series of presumptions.

Section 21-L of the Bankruptcy Act, which went into effect in September of 1938, provides as follows:

> "In any proceeding under this Act against a bankrupt for an accounting by him for his property or the disposition thereof, or to compel a turnover of property by him, if his books, records, and accounts shall fail to disclose the cost to him of such proprty sold by him during any period under consideration, it shall be presumed, until the contrary shall appear, that such property was sold at a price not less than the cost thereof to him."

The Trustee in the case at bar did rely upon such presumption and submitted figures as to the cost of the merchandise sold, predicated upon such presumption. The figure of $69,921.24 is based upon a mathematical compu-

tation to the effect that the bankrupt had on hand, as of December 31st, according to a certain perpetual inventory sheet, a certain amount of merchandise; that between January 1 and September 28, 1939 it sold merchandise of a cost value in a given amount; that it had purchased a given amount of merchandise according to its purchase invoices; and that it therefore should have had on hand the amount directed to be turned over on September 28, 1939. In order to arrive at the amount alleged to be unaccounted for, the Trustee relied on the presumption that the merchandise was sold at a figure not less than cost, and the Referee adopted the figures as submitted by the Trustee's accountant.

The courts below, in granting the turnover order, permitted the Trustee to rely upon a presumption under Section 21-L; the presumption that if there was a failure to account, according to the mathematical computation of the Trustee's accountant, petitioner was in possession or control of the property unaccounted for as of the date of the filing of the petition in bankruptcy, and the presumption that if petitioner had possession on the date of the filing of the petition in bankruptcy he had possession and control on the date of the making of the turnover order, three and a half years later.

Petitioner contends that the Trustee cannot now again rely upon a further presumption that petitioner still continues to hold the property and that his refusal to turn same over is deliberate and wilful but, on the other hand, that the Trustee should be required to prove, by clear and convincing evidence, that petitioner still has possession and control of the property and that petitioner wilfully and deliberately refuses to turn the same over to the Trustee in Bankruptcy. This contention is based primarily upon the theory that the Trustee, in connection with a motion to punish for contempt for failure to comply with a turnover order, should not be permitted to rely upon a presumption that the order, once made, carries a presump-

tion that petitioner continues to have possession of the property where the order itself was based upon three separate presumptions. Such a situation has not been discussed by the United States Supreme Court or by any other Court in connection with contempt proceedings arising out of a turnover order.

One presumption cannot be built upon another.

Looney v. *Metropolitan Railroad Co.*, 200 U. S. 480, 487, 488, 26 S. Ct. 303, 50 L. Ed. 564;
United States v. *Ross*, 92 U. S. 281, 285, 23 L. Ed. 707;
Manning v. *Insurance Co.*, 100 U. S. 693, 699, 25 L. Ed. 761.

In *Brady* v. *United States*, 24 Fed. (2d) 399, the court at page 404 stated as follows:

> "It is well settled that presumptions cannot be based on presumptions. Vernon v. U. S. (C. C. A. 8) 146 F. 121, 126; 22 C. J. p. 84, Sec. 27, page 99, Sec. 40. We conclude that the evidence was insufficient to support the verdicts of guilty. See Freeman v. U. S. (C. C. A. 3) 20 F. (2d) 748."

In *Lincoln Nat. Life Inc. Co.* v. *Erikson*, 42 Fed. (2d) 997, the court at page 1002 stated as follows:

> "*The result is that plaintiff's case is built upon presumptions based one upon another. Such a course of procedure is not allowable, either in a civil or criminal case.* 22 C. J. p. 84, Sec. 27; 9 Encyc. of Evid. p. 880; Brady v. United States, 24 F. (2d) 399, 404 (C. C. A. 8); General Reins. Corp. v. Southern Sur. Co., 27 F. (2d) 265, 272 (C. C. A. 8) and cases cited." (Italics writer's.)

To the same effect see:

Brown v. *Maryland Casualty Co.*, 55 Fed. (2d) 159.

In *General Reinsurance Corporation* v. *Southern Surety Co.*, 27 Fed. (2d) 265, the court at pages 272, 273, stated as follows:

> "The argument does not appear to us to be sound. In the final analysis it bases one presumption upon another presumption. The first presumption is that, if the surety company had investigated, it would have obtained knowledge of the insolvency of the trust company and of Bell. The second presumption is that, if the surety company failed to disclose such knowledge, it would be guilty of a fraudulent concealment. The second presumption, viz. of fraudulent concealment, is thus based upon the first presumption, of knowledge. But a presumption, in order to be valid, must be based upon facts, not upon another presumption. 9 Encyc. of Evid. p. 880; United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Manning v. Ins. Co., 100 U. S. 693, 698, 25 L. Ed. 761; United States v. Carr, 132 U. S. 644, 653, 10 S. Ct. 182, 33 L. Ed. 483; Looney v. Metropolitan R. Co., 200 U. S. 480, 488, 26 S. Ct. 303, 50 L. Ed. 564; Cunard S.S. Co. v. Kelley (C. C. A.) 126 F. 610, 615; Uhlman v. Brewing Co. (C. C.) 53 F. 485; U. S. F. & G. Co. v. Bank, 145 F. 273, 279 (C. C. A. 8); Vernon v. United States, 146 F. 121 (C. C. A. 8); Missouri, K. & T. Railway v. Foreman, 174 F. 377, 383 (C. C. A. 8); Smith v. Pennsylvania R. Co. (C. C. A.) 239 F. 103; Ringrose v. Sloane (D. C.) 266 F. 402; Atchison, T. & S. F. Ry. Co. v. DeSedillo, 219 F. 686, 689 (C. C. A. 8); Wagner v. United States, 8 F. (2d) 581, 586 (C. C. A. 8); In re Elias (D. C.) 240 F. 448; Keen v. United States, 11 F. (2d) 260 (C. C. A. 8); Niederluecke v. United States, 21 F. (2d) 511 (C. C. A. 8)."

It is clear therefore that the principle of law laid down by the Supreme Court in *Re Oriel* v. *Russell*, cited supra, that a turnover order raises the presumption that the order was correct and that the respondent still has possession of the property and his refusal constitutes a deliberate and wilful violation of the order does not apply to the facts in the case at bar since the order itself was based upon at least three separate presumptions. Under such circum-

stances another rule of law should apply, namely, that the Trustee must establish by clear and convincing proof, through facts rather than presumptions, that the order is correct and that petitioner has ability to comply and that his refusal constitutes a wilful and deliberate violation thereof.

POINT B

The right of a Trustee to rely upon a presumption that the turnover order carries with it the presumption of continued possession should depend upon the time that elapses between the date of the filing of the petition and the date of the turnover order, where such order is predicated upon a mathematical computation, as in the case at bar.

The Trustee in the case at bar relied upon a mathematical computation. The assignment for the benefit of creditors was executed on September 28, 1939, and the turnover order was not made until February 23, 1943, a period of three and a half years later. Petitioner contends that the presumption that a bankrupt continues to hold assets which at the time of adjudication he unlawfully withheld from the Trustee grows weaker as time passes until it finally ceases.

In the case of *Marin* v. *Ellis*, 15 Fed. (2d) 321, the bankrupt was adjudicated on December 27, 1922. The Trustee filed his petition for a turnover on November 27, 1923, approximately ten months after the adjudication, and did not bring his petition on for hearing before the referee until June 17, 1924. An order denying the turnover was made by the referee on August 27, 1925. The Trustee filed his petition to review on October 19, 1925. The denial of the petition was based upon the fact that the Trustee had failed to prove that the bankrupt, at the time that the order was made, had possession or control, or could turn over to the Trustee merchandise or its cash equivalent of the

value of $15,000. The District Court confirmed the order of the referee dismissing the Trustee's petition for a turnover order and the Circuit Court of Appeals also confirmed the referee and, in so doing, stated at page 321 as follows:

> "The legal presumption is that a bankrupt, who at the time of his adjudication in bankruptcy has and unlawfully holds back from his trustee in bankruptcy a part of his property, or of its proceeds, continues to hold it or them, *but this presumption grows weaker as time passes, until it finally ceases to exist.*" (Italics writer's.)

Another case which is directly in point and supports the contention of petitioner is *In re Walt*, 17 Fed. (2d) 588. In connection with the motion to punish for contempt in that case testimony was adduced on the question of the bankrupt's inability to comply with the turnover order and the court, at pages 592, 693, stated as follows:

> "The testimony which the bankrupt has offered as an excuse for not complying with the order of the referee is not convincing. I am of the opinion that he has been dishonest with reference to this creditors; that if he was ordered to go to jail, he would probably find the $2,500 and pay it over. In fairness, however, I must admit that I am not morally certain that he now has possession or control of this $2,500, and that, if I made an order committing him for contempt, it would be upon my belief merely that he has it or can get it. It must be conceded that it is now two years since he failed, that he has a wife and children, and that they have been sick. Whether the business has made money or not does not appear. *The presumption that the bankrupt still has this money is not as strong as it was when the referee made his order. If the trustee had procured the turnover order sooner, and had brought a contempt proceeding more promptly, the situation would be different. It is probable that the bankrupt has been guilty of concealment of assets and of false swearing; but, being in doubt as to the sufficiency of the evidence to justify a commitment for contempt, I shall give the bankrupt the benefit of the doubt.*

"The order to show cause will be discharged, and the order of January 18, 1927, entered prior to the last hearing, will be vacated and set aside." (Italics writer's.)

In the case at bar the general assignment was made on September 28, 1939. An involuntary petition was filed on December 20, 1939. The turnover proceedings were not instituted until October 25, 1940, and as late as October 25, 1941, the Trustee served an amended petition with respect to the turnover. The order for the turnover was not made until February 23, 1943, three and a half years after the assignment was made. An order to show cause to punish for contempt was not obtained by the Trustee until June 14, 1943, returnable on June 30th. Because of appeals from the turnover order to the Circuit Court of Appeals and the Supreme Court of the United States, the motion to punish was not decided until September 10, 1945.

Using the language of the Court in *In re Walt,* cited supra, even if the Trustee was entitled to rely upon the presumption of continued possession in connection with the obtaining of the order, the lapse of time has created more than sufficient doubt of the evidence of possession and control of the property in question to warrant the refusal to grant an order to punish the respondent for contempt.

The least that can be said under the circumstances is that because of the lapse of time involved the Trustee should not be permitted to rely upon a presumption that the appellant still has possession and control of the property in question and wilfully withholds the same from the Trustee, but he should be relegated to prove such possession and control by facts separate and distinct from the presumption relied upon by him.

POINT C

The failure to take testimony on the question of possession or control of the property and on the question of whether the refusal to comply with the turnover order is wilful and deliberate where petitioner, in his affidavit in opposition to the motion to punish for contempt, requested that a hearing be held and testimony be adduced on such issues, violated the constitutional rights of petitioner.

In the cases of *Oriel* v. *Russell* and *Prela* v. *Hubschman*, cited supra, the Supreme Court at page 127 stated as follows:

> "In the two cases before us, *the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turnover order. They did not succeed in meeting the burden which was necessarily theirs in each case, and we think, therefore, that the orders of the Circuit Court of Appeals in affirming the District Court were the proper ones.*" (Italics writer's.)

The Trustee in his petition on the original turnover proceedings made no reference to Section 21-L of the Bankruptcy Act. After all of the testimony was adduced and the hearing was closed the Referee made a finding that the merchandise was sold at a price not less than cost, based upon the presumption under Section 21-L and not upon proof as to actual cost. Petitioner, during the course of the hearing, was not advised of any contention by the Trustee that he relied on Section 21-L of the Bankruptcy Act and therefore did not present testimony that the Trustee did have in his possession books and records from which the price of the merchandise sold during the period in question could be ascertained and although an opportunity

was sought to introduce such evidence by a motion to reopen the proceedings such application was denied and petitioner never obtained an opportunity to prove these facts.

Further, in the affidavit submitted in opposition to the motion to punish for contempt petitioner requested that a hearing be held and testimony be adduced on the question of whether petitioner had possession or control of the property in question and as to whether the refusal to comply is wilful and deliberate, but the motion to punish for contempt was granted without affording petitioner an opportunity to adduce such testimony.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law. In the case at bar petitioner will be deprived of his liberty if an opportunity is not given to present the evidence which is necessary to refute the proposition that the Trustee is entitled to rely on a presumption of law under Section 21-L and to present evidence that he does not have in his possession or control the property set forth in the turnover order, and that the failure to comply with said turnover order is not wilful and deliberate.

One of the basic requisites of due process when applied to judicial proceedings is that the parties shall have notice and an opportunity to present every available defense. To that effect see *In re Rosser,* 101 Fed. 562, 567, 568, where the Court stated:

> "And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected

are violative of the fundamental principle of our laws, and cannot be sustained. Gentry v. U. S. (C. C. A.), 101 Fed. 51; Burton v. Platter, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; Windsor v. McVeigh, 93 U. S. 274, 277, 278, 23 L. Ed. 914; Capel v. Child, 2 Cromp. & J. 558, 574; Hovey v. Elliott, 167 U. S. 409, 414, 416, 446, 17 Sup. Ct. 841, 42 L. Ed. 215; Galpin v. Page, 18 Wall. 350, 368, 21 L. Ed. 959; Underwood v. McVeigh, 23 Grat. 409, 413; Henry v. Carson, 96 Ind. 412; Hovey v. Elliott, 145 N. Y. 126, 39 N. E. 841; Taussig's Ex'rs v. Glenn, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; Merrill v. Rokes, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452."

In *State of Kansas ex rel. Beck, Atty. Gen. et al.* v. *Occidental Life Ins. Co. et al.*, 95 Fed. (2d) 935, the Court, at page 937, stated as follows:

> "The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

It appears that in a case where the turnover order was based upon three separate presumptions, as herein discussed, though the law is well settled that a presumption cannot be based upon a presumption, the due process of law clause of the Constitution of the United States and justice require that petitioner be permitted to introduce evidence to show his inability to comply with the turnover order and to show that his failure to comply was not wilful or deliberate. The failure of the Courts below to afford petitioner an opportunity to submit such testimony will deprive him of his liberty without due process of the law.

In *In re Fisher*, 32 Fed. Supp. 69, the Court, at page 73, stated as follows:

> "Even if the bankrupt still fails to give any credible explanation of the disposition of the missing merchandise and books, or otherwise to account therefor, still the turnover order should not be passed if the referee is satisfied from further evidence that it is entirely beyond the power of the bankrupt to comply with the order. May v. Henderson, supra, 268 U. S. page 120, 45 S. Ct. 456, 69 L. Ed. 870; Kirsner v. Taliaferro, supra, 202 F. page 60."

The granting of the motion to punish for contempt without the taking of testimony has, therefore, deprived petitioner of his constitutional rights.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that this important question may be determined and that to such end a writ of certiorari be granted and that this Court review the decision of the Circuit Court of Appeals and finally reverse it.

ARCHIBALD PALMER,
Counsel for Petitioner.

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No. 1078

FILED
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IN THE

Supreme Court of the United States

October Term—1945

ABRAHAM JESKOWITZ,

Petitioner,

—against—

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH GLASS,
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SYDNEY W. CABLE,
Of Counsel.

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ABRAHAM JESKOWITZ,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nature of Order

This case involves an order, dated September 10, 1945, adjudging petitioner Jeskowitz in contempt of court in having wilfully disobeyed a turnover order, dated February 23, 1943 (128-129).[1] Upon appeal, said turnover order was unanimously affirmed on argument in open court by the United States Circuit Court of Appeals for the Second Circuit (49, at p. 49).

The turnover order, the certificate of contempt, and the contempt order severally state that petitioner has now in his possession or under his control certain merchandise of the bankrupt of the cost value of $69,921.24 or the proceeds thereof; $875, the proceeds of a diamond ring converted by

1 All references are to the folios of the record.

petitioner; and books and records of the bankrupt consisting of its journal for 1938, general ledger for 1937, all inventory sheets for 1937-1939, and purchase invoices for 1937 (32-36; 68-71; 128-129).

The petition to punish for contempt and the supplement thereto state the facts as to petitioner's wilful failure to turn over those properties to the trustee in bankruptcy (14-26; 79-89). Petitioner's affidavit in opposition to the motion to punish for contempt merely rehashes certain issues involved in making the *antecedent* turnover order and demands a further hearing on the question of whether petitioner "has possession or control of the property in question" (119).

The only question in the case was whether the contempt order—not the antecedent turnover order—was properly made.

Prior Proceedings and Opinions

The case has been long and frequently in the courts, including this Court. On April 28, 1943, the turnover order was confirmed by the District Court. *In re Union Fabrics, Inc.*, 50 F. Supp. 145. On July 21, 1944, it was affirmed by the Circuit Court of Appeals. *Cohen* v. *Jeskowitz*, 144 F. 2d (C. C. A. 2d) 39. On December 11, 1944, this Court denied certiorari. *Jeskowitz* v. *Carter*, Supreme Court, Law ed., Advance Opinions, Vol. 89, No. 4, 237. On January 2, 1945, this Court denied a petition for rehearing of its denial of certiorari. *Jeskowitz* v. *Carter*, Supreme Court, Law ed., Advance Opinions, Vol. 89, No. 5, 285. On February 9, 1945, the Circuit Court of Appeals made an order denying petitioner's motion for leave to reopen the turnover proceedings and to take further accounting testimony proffered by petitioner. On May 21, 1945, this Court

denied petitioner's petition to review that order. *Jeskowitz* v. *Carter,* Supreme Court, Law ed., Advance Opinions, Vol. 89, No. 15, 1157. Now, for the fourth time in the course of his assiduous exploitation of the possibilities of delay, petitioner again presents this case to this Court for a writ of certiorari to review the order of the Circuit Court of Appeals affirming the contempt order.

This Court denied certiorari first to review the turnover order and then to reopen the turnover proceedings although, in a concurring opinion affirming the turnover order in this case, one of the judges of the Circuit Court of Appeals expressed the hope that this Court might grant certiorari to consider the presumption of continuance of possession. *Cohen* v. *Jeskowitz,* 144 F. 2d (C. C. A. 2d) 39, 40. The question of that presumption was raised in connection with the turnover order in a similar case which was affirmed by the Circuit Court of Appeals on the authority of its decision in this. *In re Luma Camera Service, Inc.,* 57 F. Supp. 632; affirmed *sub nomine Zeitz* v. *Maggio,* 145 F. 2d (C. C. A. 2d) 241. In that case, too, this Court denied certiorari. *Maggio* v. *Zeitz,* Supreme Court, Law ed., Advance Opinions, Vol. 89, No. 8, 562.

The law concerning the validity of the *turnover* order in this case is settled.

Statement of the Case

Respondent controverts as erroneous petitioner's "Statement of Facts". It is merely a rehash of contentions made many times below, in the District Court, the Circuit Court of Appeals, and in this Court concerning the validity of the turnover order. That is not *this* case. This case concerns the validity of the contempt order. The few simple facts set forth under the heading "Nature of Order" at pages 1-2, *supra,* constitute a statement of this case.

For a complete and accurate statement of the facts concerning the other—the prior concluded case in respect of the turnover order—this Court is respectfully referred to the opinion of the Circuit Court of Appeals in *Cohen* v. *Jeskowitz*, 144 F. 2d (C. C. A. 2d) 39, and to the opinion of the District Court in *In re Union Fabrics, Inc.*, 50 F. Supp. 145.

ARGUMENT

I. The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

II. Petitioner's alleged reasons for granting certiorari are a confused inversion of the principles of the *Oriel* and other applicable cases.

III. Petitioner's erroneous contentions concerning the merchandise inventory do not touch the other two parts of the contempt order.

IV. The interests of justice require that there be no further delay in enforcement of the contempt order.

POINT I.

The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

The threshold proceedings in respect of the turnover order and whatever questions may have been involved therein are no longer here. *Oriel* v. *Russell*, 278 U. S. 356, is determinative on that point. In that case, in contrast to this, the petitioner had not had the benefit of a review on appeal of the validity of the turnover order. Nevertheless, this Court held (p. 363):

> "* * * Being made, it should be given weight in the future proceedings as one *that*[1] *may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover.*"

The turnover order having been made, this Court further held (p. 363):

> "* * * Thereafter on the motion for commitment the *only* evidence that can be considered is the evidence of something that has happened since the turnover order was made, showing that *since* that time there has *newly* arisen an inability on the part of the bankrupt to comply with the turnover order."

In *In re Siegler*, 31 F. 2d (C. C. A. 2d) 972, it was held (p. 973):

> "* * * Any difference of opinion respecting the force and effect of a turnover order, which may have pre-

1 Italics in this and subsequent quotations are ours, unless otherwise indicated.

> vailed before the decision of the Supreme Court, in Prela v. Hubshman,[2] 49 S. Ct. 173, 73 L. Ed.—, *is now out of place in any discussion of the subject.* The amount to be paid is conclusively fixed by the order, and no evidence can properly be considered on a motion for commitment for contempt, except that which tends to show inability on the part of the bankrupt to comply with the order because of something which has taken place since the order was made."

To the same effect are *In re Roxy Liquor Corporation*, 107 F. 2d (C. C. A. 7th) 533, 535; and *Toplitz* v. *Walser*, 27 F. 2d (C. C. A. 3d) 196.

In this case petitioner did not attempt to give any evidence of a present inability to comply with the turnover order, caused by a factual situation which had developed since the entry of the turnover order. His entire affidavit in opposition to the motion to punish for contempt is merely another attack upon the turnover order in terms which, as appears from the affidavit, were rejected not only in the antecedent original proceedings and appeals, but also upon the motion to reopen the turnover proceedings which was denied by the Circuit Court of Appeals and in respect of which this Court also denied certiorari (91-120).

It is manifest that the contempt order in this case was necessarily affirmed by the Circuit Court of Appeals on the principles laid down by this Court in the *Oriel* case, and that no question of law worthy of review by this Court exists in this case.

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2 The companion case to *Oriel* v. *Russell*, 278 U. S. 356, decided therewith in one opinion.

POINT II.

Petitioner's alleged reasons for granting certiorari are a confused inversion of the principles of the *Oriel* and other applicable cases.

Petitioner's first and second points, to the effect that the trustee has the burden of proving possession at the time when the contempt order is made, stand the applicable rule on its head. After the turnover order has been made, the burden of proving present inability to comply therewith, caused by a factual situation which has developed since the entry of the turnover order, is upon the party against whom the turnover order is directed.

> *Oriel* v. *Russell*, 278 U. S. 356, 363;
> *In re Roxy Liquor Corporation*, 107 F. 2d (C. C. A. 7th) 533, 535;
> *In re Siegler*, 31 F. 2d (C. C. A. 2d) 972, 973;
> *Toplitz* v. *Walser*, 27 F. 2d (C. C. A. 3d) 196.

Petitioner failed to sustain that burden.

Petitioner's contentions concerning presumption upon presumption are fallacious. The turnover order is an adjudication of petitioner's possession *in praesenti* (34-36). The turnover order having been affirmed, there can no longer be argument about any legal presumption upon which it may have been based, any more than an affirmed judgment upon the verdict of a jury can be subjected to an exploration of the validity of every inference of fact involved in the verdict upon which the judgment was made and thereafter affirmed.

Petitioner's third point, to the effect that he did not have ample opportunity to be heard in the hearings which cul-

minated in the turnover order, is frivolous. Those hearings were detailed and protracted. Every conceivable opportunity to be heard and make explanations was accorded petitioner. (*Cf.* voluminous record submitted to this Court upon petitioner's first application for a writ of certiorari, *Jeskowitz* v. *Carter,* Supreme Court, Law ed. Advance Opinions, vol. 89, No. 4, 237.) Petitioner made a motion to reopen that record to proffer the same accounting testimony referred to in his affidavit on the motion to punish him for contempt (108-113). The Circuit Court of Appeals denied that motion, and this Court denied certiorari to review its order in that respect.

The rest of petitioner's third point, to the effect that he did not have ample opportunity to be heard in the proceeding which resulted in the contempt order, is also frivolous. No one prevented him from showing in that proceeding present inability to comply with the turnover order, caused by a factual situation which had developed since the entry of the turnover order. Instead of availing himself of that opportunity, petitioner in his affidavit in opposition to the motion to punish him for contempt sought only to rehash the questions of law and fact involved in the antecedent original proceedings and appeals before the referee, the District Court, the Circuit Court of Appeals and this Court.

The District Court "read and studied" petitioner's affidavit in opposition to the motion to punish him for contempt, as well as "the brief of his attorneys submitted therewith" (121-122). The matter was argued by counsel (127). There was nothing else to be heard that could properly have been heard unless the turnover proceedings were to be reopened.

POINT III.

Petitioner's erroneous contentions concerning the merchandise inventory do not touch the other two parts of the contempt order.

Petitioner has been adjudged in contempt not only for failure to turn over merchandise inventory or its proceeds, but also for failure to turn over books and records consisting of the bankrupt's journal for 1938, general ledger for 1937, all inventory sheets for 1937-1939, and purchase invoices for 1937, in petitioner's possession or under his control (128-129). He has also been adjudged in contempt for failure to turn over the proceeds of a converted diamond ring (128).

All of petitioner's arguments concern only the presumption of continued possession in respect of the merchandise inventory or its proceeds. None of them touch petitioner's failure to turn over the above described books of account and records and the proceeds of the diamond ring which he converted. The now settled doubt of the propriety of applying the presumption of continued possession to merchandise inventory when considered in connection with the turnover order—a stage of this case long since past—has never been extended to "specific articles like books of account" (*Seligson* v. *Goldsmith,* 128 F. 2d (C. C. A. 2d) 977, 979).

The contempt order is valid in respect of the merchandise inventory or its proceeds for the reasons set forth in points I and II, *supra.* But whether or not valid in that respect, the conclusion is irresistible that the contempt order is valid in respect of the books of account and the pro-

ceeds of the converted diamond ring—those parts of the contempt order which are not touched by petitioner's erroneous contentions in respect of the merchandise inventory or its proceeds.

POINT IV.

The interests of justice require that there be no further delay in enforcement of the contempt order.

The attempt to compel petitioner to comply with the turnover order has thus far been thwarted at every turn. The certificate of contempt was dated May 28, 1943 (67-71). The motion to punish for contempt was heard June 30, 1943 (47-60). Contempt proceedings were stayed pending appeal to the Circuit Court of Appeals from the turnover order (47-53).

After affirmance of the turnover order by the Circuit Court of Appeals on July 21, 1944, the trustee in bankruptcy again moved to punish for contempt (7-26). Petitioner countered with a petition to this Court for certiorari to review the order of affirmance. When that was denied on December 11, 1944, petitioner countered with a petition to this Court for rehearing of its denial of certiorari. When that was denied on January 2, 1945, petitioner countered with an application to the Circuit Court of Appeals for leave to reopen the turnover proceedings. When that was denied on February 9, 1945, petitioner countered with a petition to this Court for certiorari to review that denial. When that was denied on May 21, 1945, the trustee in bankruptcy filed a supplemental petition verified May 29, 1945 in support of his motion to punish petitioner for contempt of court (79-89). The order granting that motion

is dated September 10, 1945 (123-132). That order, too, was stayed pending the hearing and determination of petitioner's appeal therefrom (131-132). On February 14, 1946, the Circuit Court of Appeals unanimously affirmed that order on argument in open court (49, at p. 49). Now, again, petitioner has countered with a petition to this Court for certiorari to review that order of affirmance. It seems obvious that said petition is made only for the purposes of delay.

The practical effect of petitioner's arguments is that, having thus far thwarted the trustee in bankruptcy by exploitation of every technicality to avoid compliance with the turnover order, he should now be given another opportunity to repeat his old story that he never was able and, therefore, is not now able to comply with the turnover order (118). On that petitioner is precluded. In *In re Arctic Leather Garment Co., Inc.*, 106 F. 2d (C. C. A. 2d) 99, it was stated (p. 100):

> "* * * The appellant was given full opportunity to be heard. But he merely repeated the old story, that no such property had ever existed, and on that issue the turnover order was of course a binding adjudication against him. *Oriel* v. *Russell, supra.*"

To the same effect is *In re Steinreich Associates, Inc.*, 83 F. 2d (C. C. A. 2d) 254, 255.

Manifestly the interests of justice require that the order punishing petitioner for contempt be not thwarted again.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated, New York, N. Y.,
April 23, 1946.

Respectfully submitted,

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